In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1420

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

NASH-FINCH COMPANY, D/B/A JACK & JILL STORES,
a Delaware corporation authorized to do business
in the State of Nebraska

INDEX

Relevant Docket Entries

UNITED STATES DISTRICT COURT

CIVIL DOCKET 1583

DATE 1969	PROCEEDINGS
Aug 29	1. Complaint with Request for Place of Trial, *Lincoln.* Issued Summons, Orig. & 1, mailed together with 1 copy of Complaint to U.S. Marshal.
Sep 8	2. Plaintiff's motion for preliminary injunction, with certificate of service and notice of hearing on motion on September 12, 1969 at 10:30 A.M.
	3. Motion of Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Union 271, to intervene as party plaintiff, Complaint of Intervenor-Plaintiff attached, and Certificate of service and notice of hearing on motion on September 12, 1969 at 9:30 A.M.
p 11	4. Summons, with return. *Total Marshal's costs $27.48*
	5. Defendant's objections to motion to intervene.
	6. Defendant's motion to dismiss.
p 12	Before Hon. Robert Van Pelt, Judge, at Lincoln. Hearing on Plaintiff's motion for preliminary injunction, filed September 8, 1969 (Filing No. 2); Motion of Amalgamated Meat Cutters to intervene as party plaintiff, filed September 8, 1969 (Filing No. 3); and Defendant's objections to motion to intervene, filed September 11, 1969 (Filing No. 4). Appearances: For Plaintiff, John I. Taylor. For Defendant, Thomas F. Dowd. For Petitioning Intervenors, David D. Weinberg and Solomon I. Hirsh. On motion of David D. Weinberg, attorneys John I. Taylor and Solomon I. Hirsh, admitted to practice in this court for this case only. Oral argument. Stipulated that exhibits attached to complaint in file are received in evidence.

DATE	PROCEEDINGS
1969	
	ORDERED: Submitted.
	7. Clerk's Court Minutes.
p 26	8. Memorandum and Order (RVP) wherein it is Ordered that: Plaintiff's Motion for Preliminary Injunction is overruled and denied; Motion of the Union to Intervene, is overruled and denied, and Defendant's Motion to Dismiss is sustained and Complaint dismissed.
	Copy mailed to counsel of record.
t. 13	9. Plaintiff's Notice of Appeal.
	Mailed copy to counsel of record.
t 21	Proposed Intervenor's Notice of Appeal. Copy to all counsel.
t 21	Certified copy of Notices of Appeal and two certified copies of all docket entries to date mailed to Clerk, U.S. Court of Appeals, Eighth Circuit.
	Certified copy of all docket entries to date mailed to NLRB, Attn: John I. Taylor, counsel for plaintiff and to counsel for proposed intervenor.

CERTIFIED COPY (Rev. April 1953) D.C. Form No. 39

UNITED STATES OF AMERICA
DISTRICT OF NEBRASKA } ss:

I, RICHARD C. PECK, Clerk of the United States District Court for the ..... District of Nebraska, do hereby certify that the annexed and foregoing is a true and full copy of the original of all docket entries to date in Civ. 1583 L, NATIONAL LABOR RELATIONS BOARD v. NASH-FINCH COMPANY, D/B/A JACK & JILL STORES, a Delaware Corporation, authorized to do business in the State of Nebraska, now remaining among the records of the said Court in my office. IN TESTIMONY WHEREOF, I have hereunto subscribed my name and I affixed the seal of the aforesaid Court at Omaha, Nebraska, on this 21st day of October, A.D. 1969.

RICHARD C. PECK
Clerk.

By Margaret J. Timm
MARGARET J. TIMM,
Deputy Clerk.

[*Caption Omitted in Printing*]

COMPLAINT

I

Plaintiff is an agency of the United States created by and charged with the exclusive administration of the National Labor Relations Act, as amended (29 U.S.C. Section 151 *et seq.*)

II

Defendant Nash-Finch Company, d/b/a Jack & Jill Stores (herein the "Company") is a Delaware corporation, which is authorized to and engaged in the retail selling of grocery and related products in Grand Island and Hastings, Nebraska.

III

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1337. The action arises under the National Labor Relations Act.

IV

This is an action for an injunction restraining defendant from, in any manner, seeking to enforce or enforcing certain portions of a temporary injunction issued by the Honorable Donald Weaver of the District Court of Hall County, Nebraska on June 25, 1969, against Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Union 271 (herein the "Union"), and persons in active concert and participation with it. Said injunction, a copy of which is attached hereto as Exhibit "A", enjoins *inter alia:* (1) anyone other than a bona fide member of the Union from picketing unless that person first subjects himself to the jurisdiction of the State Court by becoming a defendant in the State Court proceeding; (2) pickets, who meet the State Court's qualifications, from instigating conversations with the Company's customers in any manner relating to the dispute; (3) anyone, other than qualifying pickets or named defendants from picketing, handbilling or otherwise "caus[ing] to be published or broadcast any information pertaining to the dispute between the parties hereto."

V

On October 9, 1968, the Union filed unfair labor practice charges against the Company alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act (29 U.S.C. Section 158(a)(1) and (5)). Subsequent to the issuance of the unfair labor practice complaint and the statutory hearing, the Trial Examiner found, in a recommended decision issued April 28, 1969, that the Company had violated the Act, *inter alia,* by refusing to bargain with the Union as the exclusive representative of its employees in an appropriate unit (A copy of the Trial Examiner's Decision is attached hereto as Exhibit "B"). Thereafter, the Company filed exceptions to the recommended decision and the case is currently pending decision before the Board.

VI

Approximately one month after issuance of the Trial Examiner's decision, the Union began picketing the Company's Grand Island, Nebraska, stores with signs advising the public that the Union was striking in protest of the Company's unfair labor practices. The Union also distributed handbills to passers-by which stated, in part, that the Company refused to bargain or comply with the findings and recommendations of a National Labor Relations Board Trial Examiner, and urged members of the public not to shop at the Company's stores (A copy of the Union's handbill was attached to the Company's petition in the State Court proceedings, which is attached hereto as Exhibit "C").

VII

On May 27, 1969, the Company filed a petition for injunctive relief (Exhibit "C") in the District Court of Hall County, Nebraska, against the Union, its officers, and certain individual pickets, alleging that the Union's picketing and distribution of handbills were in violation of various Nebraska statutes. On the next day, May 28, the State Court issued a temporary restraining order (Exhibit "D" attached hereto). Thereafter, the Union filed a motion to vacate the temporary restraining order and to dismiss the petition. On June 25, 1969, however, Judge Weaver denied

the motions and issued a temporary injunction (Exhibit A). In addition to the provisions of the injunction described in paragraph 4, the injunction limits the Union to two pickets at each of the Company's stores, and enjoins individual pickets from distributing handbills or literature pertaining to the dispute in any manner which would tend to halt or slow the movement of traffic, blocking or picketing entrances or exits to the store, and "[d]oing any act in violation of Sections 28-812, 28-814.01 and 28-814.02 R.S. Neb. 1964."

VIII

Said temporary injunction violates Article VI, Clause 2, of the Constitution of the United States (the Supremacy Clause) since it conflicts with the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 191 *et seq.*). The temporary injunction, *inter alia,* regulates and restrains peaceful picketing or handbilling which is arguably protected or arguably prohibited by the National Labor Relations Act.

WHEREFORE, Plaintiff prays:

1. Defendant be restrained from, in any manner, proceeding under or enforcing these portions of the Nebraska State Court injunction which regulates or restrains conduct which has been pre-empted by the National Labor Relations Act.

2. For such other and further relief as the Court may deem proper.

.....

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C.
382-5384

EXHIBIT A

[*Caption Omitted in Printing*]

[filed June 25, 1969, M. E. Moses, Clerk]

[I, M. E. Moses Clerk of Distrist Court of Hall County Nebraska do here by certify the fore going copy to be a full, true and correct copy of the original record there of: Now remaining on file in said court; this 25th day of June 1967

M. E. Moses
Clerk of District Court

By Margaret Kozel

JOURNAL ENTRY

This matter came on for hearing before the court on June 12, 1969, on plaintiff's application for a Temporary Injunction. Upon evidence adduced and this Court being fully advised in the premises, this Court finds that:

A. "Pickets" as involved in this action, are persons visibly displaying a sign on the person as set forth in Sec. 28-814.02 of laws of Nebr.;

B. That identity of individual pickets is necessary for the enforcement of any order of this Court;

C. That plaintiff is entitled to a temporary injunction of limited scope until the further order of the Court.

It is, therefore, ordered that upon approval of plaintiff's bond:

1. No person other than bona-fide members of defendant union shall engage in picketing unless such person shall have first submitted himself or herself to the jurisdiction of this Court by filing a general appearance herein as a defendant in these proceedings;
2. Pickets are limited to two at each Grand Island store location and pickets and enjoined from:
   (a) Distributing hand bills or literature pertaining to the dispute along or upon public streets and highways in any manner which halts or slows the movement of traffic;
   (b) Blocking or picketing entrances or exits to plaintiff's retail stores in Grand Island;

(c) Instigating conversations with plaintiff's customers in any matter relating to the dispute herein;

(d) Doing any act in violation of Sections 28-812, 28-814.01 and 28-814.02 R.S. Neb. 1964.

3. That no person, other than a picket or the named defendants, shall, on behalf of defendants, in any manner whatsoever picket or loiter about the premises of plaintiff's Grand Island stores or disrupt ingress and egress thereto, nor display signs or distribute hand bills or literature or cause to be published or broadcast any information pertaining to the dispute existing between the parties hereto.

4. Bond to be deposited by plaintiff is fixed in amount of $5,000.00.

/s/ Donald H. Weaver
DISTRICT JUDGE DONALD WEAVER

June 19, 1969

EXHIBIT B

[Caption Omitted in Printing]

TRIAL EXAMINER'S DECISION

WILLIAM J. BROWN, Trial Examiner: This proceeding under Section 10(b) of the National Labor Relations Act, as amended, hereinafter referred to as the "Act," came on to be heard at Grand Island, Nebraska, on February 11 and 12, 1969. The original charge of unfair labor practices had been filed October 9, 1968[1] by the above-indicated Charging Party, hereinafter sometimes referred to as the "Union," and the complaint herein was issued January 7, 1969 by the General Counsel of the National Labor Relations Board acting through the Board's Regional Director for Region 17. It alleged, and the duly-filed answer of the above indicated Respondent, hereinafter sometimes referred to as the "Company," denied the commission of unfair labor practices defined in Sections 8(a)(1) and (5) of the Act.

At the hearing the parties appeared and participated as noted above with full opportunity to present evidence and argument on the issues. Subsequent to the close of the hearing briefs were received from all parties and have been fully considered. On the entire record herein and on the basis of my observation of the witnesses, I make the following:

Findings of Fact

I. THE BUSINESS OF THE COMPANY

The pleadings and evidence indicate and I find that the Company is a corporation organized and existing under and by virtue of the laws of the State of Minnesota and engaged in the business of [2] retail selling of grocery and related products at locations in several midwestern states including locations in Grand Island and Hastings, Nebraska. In the course of its business operations in Nebraska the Company annually receives products valued in excess of $50,000 and shipped to its Nebraska locations directly from points outside the State of Nebraska. The annual volume of retail sales at the Nebraska locations exceeds $500,000. I find, as the Company concedes, that it is an employer engaged in

[1] Dates hereinafter relate to the year 1968 unless otherwise indicated.

commerce within the purview of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The pleadings and evidence establish that the Union is a labor organization within the purview of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

This case concerns events occurring at the Company's retail stores in Hastings and Grand Island, Nebraska, in late summer and fall of 1968. The Union has had collective-bargaining relations with the Company covering the four Hastings stores [2] for a substantial number of years prior to 1968 and in August commenced an organizational campaign directed at the Company's three Grand Island locations. The union campaign was directed by Union Representatives Robert Parker and Vernon Allen, the latter being also Union first vice-president. The pleadings establish the appropriateness of the unit involved in the Grand Island locations, viz: all full-time and regular part-time meat market employees employed in the meat department of the Company's Grand Island stores, including meat cutters, meat wrappers and clean-up boys; but excluding office clerical employees, food clerks, guards and supervisors as defined in the Act, and all other employees.

The pleadings also establish the supervisory status of the following Company representatives:

Charles Engh, Superintendent of Retail Operations
Alvin Gross, Nebraska Division Manager
Clayton Kent, Zone Store Manager
Don Petersen, Head Meat Cutter, West Heights Store
Jimmie Hansen, Head Meat Cutter, Hillcrest Store
Wes Kensinger, Head Meat Cutter, West Second Store
Robert Dawkins, Head Meat Cutter, South Locust Store
Johnny Roberts, Head Meat Cutter, North Broadwell Store

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[2] The Hastings stores are located at West Heights, Hillcrest, West Mall and South Elm; the Grand Island locations are at North Broadwell, West Second and South Locust. The distance between Hastings and Grand Island is about 25 miles.

A. The Refusal to Bargain

It appears from a stipulation of the parties (General Counsel's Exhibit 2) that at all material times, i.e., throughout the period August 20 to October 10, the total number of employees in the above-mentioned unit varied between 14 and 16. General Counsel's Exhibits Nos. 3 through 9, inclusive, are union authorization cards signed by seven employees[3] [3] who remained members of the bargaining unit at all material times. These seven cards were obtained by Union Representative Parker at a meeting in the Labor Temple in Grand Island on August 20, and constitute an unequivocal authorization of the Union as the signers' bargaining agent. There appears to be no question as to their validity as designations of the Union as the collective-bargaining representative of the signers.

The August 20 meeting at the Labor Temple was attended by Robert Dawkins and Johnny Roberts, meat department managers of the Company's South Locust and North Broadwell stores. Their supervisory status is established by the pleadings. Following the meeting Dawkins visited Ellen Bishop, an employee of the North Broadwell store who knew of Dawkins' supervisory status at the South Locust store. Bishop had previously let it be known that if a majority of employees signed for the Union she would also sign; she understood Dawkins to say on the night of August 20 either that the Union had a majority or that they were pretty sure that they had a majority. She thereupon signed an authorization card (Charging Party's Exhibit 2), her signature being witnessed by Dawkins. In the circumstances of this case it cannot be said that Dawkins, in any realistic sense, solicited her signature nor that his status as a supervisor at a store other than the one in which she worked affected the validity of her card. See *I.T.T. Semi-Conductors, Inc.*, 165 NLRB No. 98, and *Ozark Motor Lines*, 164 NLRB No. 41. I conclude that Bishop's card constituted a valid designation of the Union as her collective-bargaining representative. With respect to the card executed by Marlene Moeller it appears that she was solicited to sign by her fellow-employee Hansen and by her supervisor Roberts. Her testi-

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[3] The employee-signers are Arthur Hansen, Emma Kammerzell, Stephen Wheeler, Eileen York, Richard Batt, Robert Krebsbach and Barbara Longsine.

mony is, however, that she had previously determined to sign a card if the majority of her fellow-employees did and when she was informed that they had, that was all the information she needed to sign the card. Her testimony also indicates that she had determined to sign sometime before August 20 on the basis of the arguments put forth to her by Hansen. In the circumstances I can only conclude that her decision to sign was completely unaffected by any supervisory influence on the part of Roberts and I conclude that her card was a valid designation of the Union as her bargaining agent.

Helen Green, an employee of the West Second store testified that she signed a union card early in September and gave it to Krebsbach for transmittal to Allen. This card apparently was lost or mislaid and she signed a second card on December 17 (General Counsel's Exhibit 29). It is clear that General Counsel's Exhibit 29 is a replacement for the card she originally signed and I conclude that she must be regarded as one of the card signers for the Union as of early September. In this regard the conclusion reached is buttressed by the fact there appears to be no contest of her signature on General Counsel's Exhibit 28(d) in which she purports to resign from the Union thereby indicating her prior authorization of the Union as her representative.

Thomas Oshlo commenced work as a regular part-time employee sometime about 2 or 3 months prior to August 29 when he signed a union card (Charging Party's Exhibit 1). Present at the time he signed the card were employees Bishop, Moeller and Hansen and Supervisor Roberts. His testimony is that Roberts, who witnessed his signature on the card, [4] did not solicit his signature but merely said that the card was there for him to sign if he wanted to. It appears plain that there was no supervisory influence conditioning or causing his signature and I conclude that his card should be regarded as a valid designation of the Union as of August 29. It appears, however, that he was transferred to the grocery department on August 31 and his card cannot be regarded as an effective designation with respect to the unit here involved subsequent to that date.

It appears that at the time of its original demand on for recognition, which was made by letter from Parker to Engh on August 21 the Union had secured valid authorizations

from nine unit employees and shortly thereafter secured additional authorization cards (Green's and Oshlo's). I conclude that on August 21 and thereafter the Union was the majority representative of employees in the unit at least until October 5 when employees resigned from membership in the Union under circumstances hereinafter set forth.

Parker's August 21 letter requested negotiations for both the Hastings and Grand Island meat market employees and, with respect to the claim therein of majority status at Grand Island, asserted a willingness to submit the authorization cards for a check of the signatures against signatures in the keeping of the Company by a neutral third party. Gross replied by letter of August 31 asserting, in effect, that there was a representation question involved which should be submitted to the Board. On September 3, Parker by letter persisted in meeting with respect to the Hastings employees and on September 6 Gross explained that the representation question related only to Grand Island and that the Company was prepared to meet concerning Hastings. By letter of September 10, Parker proposed a date of September 18 for negotiations, tacitly accepting the limitation contained in Gross' September 6 letter, viz that bargaining would relate only to the Hastings locations. The September 18 date was shifted by mutual agreement to September 23 and on that date Parker, Allen and Tate, the Company's attorney, met in the latter's office. At the September 23 meeting and at another meeting on September 25, there is a conflict in the accounts of Parker and Tate as to whether the discussions related only to Hastings or also embraced other conditions of employment at Grand Island. Allen did not testify on the matter. I credit Tate's testimony that these discussions related only to Hastings and that recognition was not demanded for Grand Island at these meetings. This conclusion also finds support in Tate's letters of September 24 requesting an election and by the filing of the RM petition covering Grand Island on September 25. With respect to the RM petition concerning Grand Island the record indicates that the petition was dismissed by the Regional Director but the reason for dismissal does not appear in the evidence.

At a union meeting on September 4 in Grand Island, a vote was taken on whether or not to strike to obtain the Omaha-Lincoln rates for meat department employees of the

Grand Island and Hastings stores. The vote was unanimous in favor of striking. Gross and Engh were informed of the vote by Head Meat Cutters Dawkins and Hansen. Gross communicated with Engh and sometime towards the end of September consulted the Company attorney respecting the Company's rights in view of reports that employees were dissatisfied with the Union. On September 25 and October 2, [5] RM petitions were filed by the Company covering, respectively, the Grand Island and Hastings Stores, and Gross was advised that it would be permissible for Company officials to provide employees with union membership revocation forms.

Sometime after the September 4 strike vote, Dawkins overheard employees of his South Locust store expressing their dissatisfaction with the imminent possibility of a strike and their desire to get out of the Union. This desire was stirred by employee awareness of the possibility of union fines being imposed for failure to support the Union by honoring picket lines. Gross secured the legal advice that it would be permissible to provide employees with union membership withdrawal forms and he caused to be reproduced (General Counsel's Exhibit 28A-J), withdrawal notices addressed to the Union and signed on October 5 by all the employees of the Grand Island (and some Hastings employees) listed above as having signed union authorization cards. The signers also sent telegrams to the Union expressing their desire to withdraw from membership. The evidence is clear that Dawkins, head meat cutter at the South Locust Store and a supervisor, was the first signer of the withdrawal petition and that Dawkins and Gross visited all three Grand Island stores and advised employees that a strike appeared imminent and that many employees desired to be free to cross picket lines without incurring liability for union fines and that their desires could be attained by signing the forms provided by the Company. The evidence clearly preponderates in favor of the conclusion that the employees were advised that in view of reports of the forthcoming strike and the desires of some employees to continue work despite a strike the Company was providing membership withdrawal forms as a means of enabling employees to decide among themselves whether they wished to utilize the forms as a means of avoiding liability for union fines.

The Company relies on *Clark Control Division of A. O. Smith Corp.*, 166 NLRB No. 55 and *Martin Theatres of Georgia*, 126 NLRB 1054 as requiring the conclusion that the conduct of its supervisors in preparing and presenting to employees the union withdrawal forms constituted no unfair labor practice. But in *Clark Control Division* there was a complete absence of any contemporaneous anti-union campaign and in *Martin Theatres* the Board adopted the Examiner's statements that

> "It is well established that an employer may not prepare, circulate or solicit employees' signatures to revocations of union designations. . . . The basic question . . . is whether the employees decide of their own free will, independently of employer solicitation of withdraw their union designations."

In the instant case, while there may have been rumblings of employee concern about the possibility of strike action, it appears clear to me that the Company over-reacted and grasped the opportunity to take affirmative steps to encourage and assist the employees in revocation of their Union designations. Furthermore, as appears hereinafter, there were contemporaneous unfair labor practices in the nature of interference with employee self-organizational rights which can only be regarded not only as having influenced the climate in which employees were presented with the union revocation forms, but as a rejection of the collective-bargaining principle within the doctrine enunciated *Joy Silk Mills*, 85 NLRB 1263, enf'd 185 F.2d 732, cert. denied 341 U.S. 914. Since the Company admits that it has at all times since August 31, refused to bargain with the [6] Union respecting the Grand Island unit, I find and conclude that it has by such refusal engaged in an unfair labor practice defined within the scope of Section 8(a)(5) of the Act.[4]

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[4] The Company has denied that the Union sought to bargain subsequent to August 21. The record indicates, however, and I find that Parker, whose testimony I credit in this regard, testified that there was bargaining respecting Grand Island employees in Tate's office on September 25 and that Parker again requested bargaining in a discussion with Gross on October 11 at the North Broadwell store.

B. *Interference, Restraint and Coercion*

1. Don Petersen

Don Petersen was at all material times the head meat cutter of the West Heights store in Hastings and admittedly a supervisor. The Complaint alleges and the Answer denies that Petersen (1) on or about September 28 informed an employee that the Company desired to organize a meeting to rid itself of the Union; (2) on or about October 7 instructed an employee that he should never speak of the Union, and (3) on or about October 3 at the West Heights store and October 5 at the West Mall and South Elm stores solicited or assisted employees to resign from the Union.

Fern Bonds, a meat market clerk in the West Heights store and a union supporter, testified that Petersen spoke to her in the back room of the store at about 5 o'clock on September 28 and said that Gross and Engh had spoken to him about calling a meeting of employees to sound out their feelings respecting the Union and about the possibility of some form of non-Union representation in view of the fact that the Company could not meet the wages demanded by the Union and might have to close some stores. Don Petersen testified that the conversation of September 28 occurred after he had determined to assemble employees to talk to Gross without the Union participating in the talk. He denied telling her that Gross or Engh asked him to arrange such a meeting. I credit Bonds' account of the conversation. Both Bonds and Petersen were union members at the time of this discussion. Nevertheless, it seems plain that Petersen acted on behalf of management in suggesting to Bonds the possibility of non-Union representation and coupling with the suggestion the threat of store closing in view of the wage demands of the Union. I find that this conversation constituted an intrusion into Bonds' right to be free from such influence in determining her position respecting the Union and constituted an unfair labor practice within the scope of Section 8(a)(1) of the Act.

With respect to the allegation that Petersen on October 7 threatened and instructed an employee never to speak of the Union, Bonds testified that upon her reporting for work Petersen called her to the office and told her that the Union had misled him. When Bonds expressed her continuing

support of the Union, Petersen, according to Bonds, told her that he did not want to hear her discuss the Union anymore. Petersen testified that the conversation became heated, as Bonds conceded, and that he merely expressed his disinclination to argue further with her. He denied forbidding Bonds to mention the Union again. I credit Petersen's account and recommend dismissal of this count of the complaint.

[7] Petersen is also alleged to have solicited and/or assisted employees to withdraw from the Union on October 3 at the West Heights store and on October 5 at the West Mall and South Elm Stores. Zetha Dillon, an employee of the West Mall store, testified that on October 5 Engh, Petersen and Hansen came to her store where Hansen and Petersen told her, in the back room, that they were not happy with Union Representative Parker and they thought employees should drop out of the Union; although her testimony is that Peterson did not ask her to sign the withdrawal form it is clear that Petersen made the petition available for her signature after telling her that the Company disapproved of the Union and thought that employees should reject it. I find that Petersen did in fact on the occasion in question urge her to sign the withdrawal petition and that thereby the Company engaged in unfair labor practices within the purview of Section 8(a)(1) of the Act.

At the West Heights Store where Richard Petersen regularly works 4¼ hours per week, Engh, according to Richard Peterson's account, introduced Don Petersen and James Hansen and then left them to talk with him. Don Petersen and Hansen had the withdrawal forms available and expressed their disapproval of the Union. While Richard Peterson testified that he had already decided to withdraw and signed before they finished their discussion, it is also clear from his testimony that Don Peterson and Hansen urged him to sign and facilitated his resignation. I find that their conduct constituted interference with Petersen's statutory right to be free from such employer conduct respecting his actions toward the Union.

2. Charles Engh

Engh is alleged to have, on October 3 at the West Heights store, interrogated an employee concerning his union activ-

ities. Fern Bonds, a clerk in that store, testified that Engh spoke to her in the back room on October 3 and asked her why she thought she needed the Union. When she replied that she felt she needed it for her protection, Engh, according to Bonds, replied that that indicated a poor relationship. Engh testified that the conversation in question took place on the selling floor and that after he told her of the filing of the RM petition Bonds stated that she still thought she needed a union to represent her. He denied questioning her in any way. I credit Bonds' account of the matter and find that on the occasion in question Engh interrogated in a manner and under circumstances constituting interference, restraint and coercion within the scope of Section 8(a)(1) of the Act.

The complaint also alleges that on October 25, at the North Broadwell store Engh urged or instructed employees not to attend union meetings. Ellen Bishop, a wrapper at the North Broadwell store and, as noted above, a union card signer, testified that on October 25, in the course of a discussion about paychecks either Gross or Engh, both being present, advised her not to attend a union meeting because a light attendance might discourage the Union. Engh did not testify on this matter and Gross' testimony is that he merely advised employees that other employees had decided not to attend union meetings. I credit Bishop's testimony that either Gross or Engh advised her not to attend a forthcoming meeting so that a light attendance might discourage the Union. By such advice the Company engaged in interference with employee rights protected under the Act.

[8] Engh is also alleged to have solicited or assisted employees to resign from the Union on October 3 and 5 at the South Elm store and on October 5, at the West Mall store. Mildred Fox testified that on October 3, Engh talked to her in the West Mall store where she worked and said that they would have a better relationship without the Union. On October 5, she testified, Engh, together with Petesen and Hansen, talked to her and asked her to sign a paper of resignation from the Union. Engh did not deny these charges and I find that on October 3 and 5 Engh solicited an employee to resign from the Union thereby engaging in unfair labor practices within the scope of Sec-

tion 8(a)(1) of the Act. The evidence is lacking with respect to similar activities at the South Elm store and I recommend dismissal of the allegations of the complaint in that respect.

3. Wes Kensinger

Kensinger, manager of the West Second store in Grand Island, is alleged on or about October 5 to have threatened employees with reprisals if the Union became the bargaining representative. I am cited to no evidence of record to support this allegation and find none. I recommend that it be dismissed.

4. Alvin Gross

Gross is alleged to have urged employees not to attend union meetings on October 7 at the West Mall store and on October 25 at the North Broadwell store. He is also alleged to have promised employees at the West Second store on or about August 22, benefits as an inducement not to support the Union, to have instructed employees of the West Mall store on October 7 and employees of the North Broadwell store on October 25 not to attend union meetings and to have solicited or assisted employee resignations from the Union on October 5 at the North Broadwell and West Second stores.

With respect to the August 22 promise of benefits at the West Second store, employee Richard Batt, a somewhat reluctant witness, testified that shortly after he signed a union card on August 20, Gross and Engh were talking to him in the store basement about the union campaign and in the course of the discussion, Gross said, after Batt complained that Safeway and Hinky Dinky paid higher wages, that the Company employees would be satisfied with what the Company would do after the union campaign was over. General Counsel cites cases said to be in support of the conclusion that such an utterance constituted interference, restraint and coercion. I do not read the cited cases as supporting this view and I find that Gross' totally ambiguous statement cannot realistically be regarded as an unfair labor practice.

With respect to the solicitation of or assistance in union membership withdrawals on October 5 at the North Broadwell and West Second stores, Bishop and Hansen, North

Broadwell employees, testified that on or about October 5, Gross stated that they did not need a third party to handle their problems and presented them and other employees with the union withdrawal form with the explanation that if the employees signed they could cross a union picket line without fear of being fined. Later that day Bishop signed but Hansen did not. The presentation of such a petition coupled with argumentation in favor of employee signing appears to be an unwarranted interference into employee rights to be free of employer influence in the matter of joining and assisting the Union and constituted an unfair labor practice within the scope of [9] Section 8(a)(1) of the Act. With respect to the West Second store, Helen Green and George Batt testified that Gross presented them with the union withdrawal form and said that their signatures thereon would protect them against union fines in the event it became necesary to cross a picket line. Although Batt conceded that Gross did not say that employees had to sign, it is clear that Gross presented the petition with arguments in favor of signing and I find that his words and actions constituted interference with employee rights and violated Section 8(a)(1) of the Act.

5. James Hansen

Hansen, head meat cutter at the Hillcrest store in Hastings, is alleged to have solicited or assisted employees to resign union membership on October 5 at the South Elm and West Mall stores. Mildred Fox, a West Mall meat wrapper, testified that on October 5 Hansen and Engh asked her to sign the union withdrawal form because they felt that they did not need the Union. Richard Peterson, a part-time employee at West Mall, testified to the same effect. Hansen, who appears to have spearheaded the Union withdrawal program, did not contradict the accounts of Fox and Peterson. I find that Hansen solicited their signatures on the union withdrawal forms and thereby engaged in interference within the scope of Section 8(a)(1) of the Act.

With respect to Hansen's activities at the South Elm store on October 5, Hansen himself testified that he circulated the union withdrawal form but denied telling employees that they had to sign the petition. I find that

Hansen's circulation of the petition in connection with Engh's exhortation to employees to sign constituted interference within the scope of Section 8(a)(1).

6. Robert Dawkins

Dawkins, head meat cutter at the South Locust store and a supervisor, is alleged to have solicited or assisted employees to resign union membership on October 5 at the North Broadwell and West Second stores. Helen Green testified that Dawkins was among the supervisory group who visited her store at West Second on October 5, and presented her and others with the union withdrawal form. She testified that Dawkins urged her to sign as a means of avoiding big fines. Dawkins conceded that he signed the petition and helped circulate it. I find that Dawkins assisted in the procuring of signatures on the withdrawal petition and thereby engaged in acts of interference within the scope of Section 8(a)(1) of the Act.

As to the North Broadwell store, Ellen Bishop testified that Dawkins was among the group who spoke to her and others in the backroom of the store and presented her and the others with the membership withdrawal form to sign as a means of avoiding liability for fines in the event of picketing. By this action Dawkins intruded into matters reserved under the Act for decision of employees without management interference and I find that on this occasion the Company, through Dawkins, engaged in an unfair act of interference within the scope of Section 8(a)(1) of the Act.

[10] ## IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Company set forth in section III, above, and there found to constitute unfair labor practices, occurring in connection with the business operations of the Company as set forthin section I, above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing such commerce and the free flow thereof.

V. THE REMEDY

In view of the findings set forth above to the effect that the Company has engaged in unfair labor practices affecting commerce it will be recommended that it be required to cease and desist therefrom and from like or related unfair labor practices and take such affirmative action including recognition of and bargaining with the Union respecting its Grand Island stores, as appears necessary and appropriate to effectuate the purposes and policies of the Act.

On the basis of the foregoing findings of fact and upon the entire record in this case, I make the following:

Conclusions of Law

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act;

2. The Union is a labor organization within the meaning of Section 2(5) of the Act;

3. All full-time and regular part-time meat market employees employed in the meat department of the Company's Grand Island Stores, including meat cutters, meat wrappers and clean-up boys; but excluding office clerical employees, food clerks, guards and supervisors as defined in the Act constitute a unit appropriate for purpose of collective bargaining under the Act;

4. At all material times the Union has been and is the exclusive representative of all employees in the aforesaid appropriate unit for purposes of collective bargaining within the meaning of Section 9 of the Act;

5. By refusing from and after August 31, 1968 to bargain collectively with the Union as exclusive representative of employees in the aforesaid appropriate unit the Company has engaged and is engaging in unfair labor practices defined in Section 8(a)(5) and (1) of the Act;

6. By suggesti[ng] the substitution of non-Union in place of union representation, by soliciting employee revocation of prior union authorizations as bargaining agent, by advising employees not to attend union meetings and by coercively interrogating employees concerning union representation the Company has engaged in unfair labor practices defined in Section 8(a)(1) of the Act;

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[11] **RECOMMENDED ORDER**

On the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case, it is recommended that the Company, its officers, agents, successors and assigns, shall:

1. Cease and desist from:
   (a) Soliciting employee revocation of Union designation cards, suggesting the substitution of non-union for Union representation, advising employee not to attend union meetings, coercively interrogating employees concerning Union representation.
   (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under the Act.
2. Take the following affirmative action which appears necessary and appropriate to effectuate the policies of the Act:
   (a) Union request, bargain collectively with the Union as exclusive representative of employees in the unit found appropriate as above and embody any understanding reached in a signed memorandum of agreement;
   (b) Post at the Company's Grand Island and Hastings stores copies of the notice attached hereto and marked "Appendix."[5] Copies of said notice, on forms provided by the Board's Regional Director for Region 17, shall, after being duly signed by an authorized representative of the Company, be posted immediately upon receipt thereof and maintained thereafter for a period of 60 consecutive days in conspicuous places

[5] If these Recommendations are adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommendations of a Trial Examiner" in the notice. If the Board's Order is enforced by a decree of the United States Court of Appeals, the notice will be further amended by the substitution of the words "A Decree of the United States Court of Appeals Enforcing an Order" for the words "A Decision and Order."

including all places where notices to employees are customarily posted. Reasonable steps shall taken by the Company to insure that said notices are not altered, defaced or covered by other material;

(c) Notify the Regional Director for Region 17, in writing, within 20 days [6] from receipt of this Decision and Recommended Order what steps have been taken to comply herewith.

It is recommended that the complaint here be dismissed as to allegations therein of unfair labor practices not herein specifiecally found to have been engaged in.

Dated at Washington, D.C., Apr. 28, 1969.

/s/ William J. Brown
Trial Examiner

[6] If these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 17, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE

NATIONAL LABOR RELATIONS BOARD

AND IN ORDER TO EFFECTUATE THE POLICIES OF THE

NATIONAL LABOR RELATIONS ACT

(AS AMENDED)

we hereby notify our employees that:

WE WILL NOT REFUSE TO BARGAIN COLLECTIVELY with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Union 271 and we will on request bargain collectively with the aforesaid union as exclusive representative of our employees in the following appropriate unit:

All full-time and regular part-time meat market employees employed in the meat department of our Grand Island stores, including meat cutters, meat wrappers and clean-up boys but excluding office clericals, food clerks, guards and supervisors.

WE WILL sign a written contract embodying any agreement resulting from such collective bargaining.

WE WILL NOT interfere with employee rights under the Act by coercively questioning employees about their Union activities, by suggesting forms of non-union representation, by soliciting employees to revoke their Union membership or by advising employees not to attend Union meetings.

NASH-FINCH COMPANY, d/b/a JACK & JILL STORES
(Employer)

Dated..... By .....
Representative (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 610 Federal Building, 601 East 12th Street, Kansas City, Missouri 64106 (Tel. No. 816-374-5282).

EXHIBIT C

[*Caption Omitted in Printing*]

PETITION

[No. 16860]

Comes now the Plaintiff and for its cause of action against the defendants alleges:

1. That the Plaintiff is a corporation organized and existing under the laws of the State of Deleware authorized to conduct business in the State of Nebraska.

2. That the defendant Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Union 271, hereinafter referred to as District Union No. 271, is an unincorporated association existing for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. Defendant Robert J. Parker is a business representative of District Union No. 271. Defendant Vernon Allen is a business representative and first vice-president of District Union No. 271. Defendant Chester W. O'Hara is the president of District Union 271. Defendant J. B. DeFontain is the secretary-treasurer of District Union No. 271. Defendants John Doe and Mary Doe, real and true names unknown, are pickets, agents, employees and servants of District Union No. 271.

3. That on May 23, 1969, defendants commenced picketing and continue to picket plaintiff's three retail grocery establishments located in Grant Island at 2121 North Broadwell, 1717 West Second Street, and 1515 South Locust Street.

4. That during the course of the aforesaid picketing, defendants have engaged in the following acts and conduct:

(a) Picketing the entrances and exits of plaintiff's retail stores by means of more than two pickets at the same time within 50 feet of said entrances and exits

(b) Picketing by means of more than two pickets at the same time within 50 feet of each other.

(c) Stopping, blocking, and preventing the free ingress egress of the public to and from the picketed premises.

5. That the foregoing acts and conduct of defendants constitutes mass picketing as proscribed by Section 28-814.02, R.R.S. Neb. 1943, Reissue 1964.

6. That said picketing is conducted by the display of signs bearing the following legend:

> "Amalgamated Meat Cutters, District Union No. 271, AFL-CIO, on strike, protesting unfair labor practices, Nash-Finch Company, Jack & Jill Stores. This dispute with the above named employer only,"

and the distribution of handbills to the public, a copy of which is attached hereto marked Exhibit A, and by this reference made a part hereof.

7. That the above representations to the public that a strike exists and that plaintiff has engaged in unfair labor practices constitutes false and malicious statements proscribed by Section *28-440,* R.R.S. Neb., Reissue 1964.

8. That during the course of said picketing, defendants have threatened, intimidated, and coerced the public and plaintiff's customers by the following acts and conduct:

(a) Threatening customers with property loss if they patronize plaintiff's establishments.

(b) Using profane and vulgar language and addressing motorists and plaintiff's customers in a loud, boisterous manner when insisting that they patronize plaintiff's competitors.

9. That during the course of said picketing, defendants have slandered plaintiff's business reputation in the community by falsely and maliciously telling plaintiff's customers that, "There are ants in the meat products."

10. That by reason of the foregoing unlawful picketing and other conduct, plaintiff's operations at its three retail establishments in Grand Island, Nebraska, have been disrupted and the business of the plaintiff has been substantially impaired and diminished. Unless the Restraining Order and Injunction prayed for herein is granted, plaintiff will be further injured and damaged as a result of defendants aforesaid unlawful picketing and other conduct. Plaintiff is suffering immediate and irreparable damage as a result of defendants acts and conduct, and plaintiff does not have an adequate and complete remedy at law.

11. This Court has jurisdiction to enjoin acts and conduct which are violative of the laws of the State of Nebraska,

irreparably damage the business reputation of the company, and which breaches the peace of the community by creating an atmosphere of public intimidation, restraint, and coercion.

WHEREFORE, the Plaintiff prays for relief as follows:

(a) That this Court issue a temporary Restraining Order enjoining defendants, its members and agents, and all persons acting in its behalf from picketing and striking plaintiff's three retail stores in Hall County Nebraska, and from otherwise interfering by picketing, striking or other conduct with plaintiff's operations and business in Hall County Nebraska.

(b) That the Court set this matter for hearing for a Temporary Injunction and that upon such hearing the Court enter its Temporary Injunction continuing said restraining order in effect until trial may be had.

(c) That upon trial the Court enter its Final and Permanent Injunction enjoining the defendants in like manner as in aforesaid Restraining Order.

(d) That this Court grant such other relief as in the premises seems just and equitable and award costs of this action to plaintiff.

Dated this 27th day of May, 1969.

NASH-FINCH COMPANY, d/b/a, JACK & JILL STORES, *Plaintiff*

THOMAS F. DOWD
515 Executive Building
Omaha, Nebraska
Its Attorney

By: Thomas F. Dowd

[*Verification Omitted in Printing*]

EXHIBIT A

To The Public

JACK & JILL STORES

(of NASH-FINCH COMPANY)
Grand Island, Nebraska

Are On Strike

Protesting Unfair Labor Practices
Of This Company

THIS COMPANY REFUSES TO BARGAIN OR COMPLY WITH OTHER FINDINGS AND RECOMMENDATIONS OF A TRIAL EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD.

Please Help Us By Not
Shopping at Jack & Jill Stores
Or Any Other Stores Operated By This Company During This Strike

District Union 271 of the
Amalgamated Meat Cutters & Butcher
Workmen of North America, AFL-CIO

EXHIBIT D

[*Caption Omitted in Printing*]

RESTRAINING ORDER

This matter came on for hearing on May 28, 1969, upon the Court's Order to Show Cause why a temporary restraining order should not be issued against the Defendants, and each of them, as requested by the Plaintiff in its duly verified Petition, restraining Defendants from picketing Plaintiff's retail stores in Hall County, Nebraska, or otherwise interferring with the Plaintiff's business in Hall County, Nebraska, and the Court being fully advised in the premises,

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that until further order of this Court, a Restraining Order is allowed restraining the Defendants, and each of them, from distributing the handbills, a copy of which is attached to Plaintiff's Petition and marked Exhibit A; blocking the entrances or exits of Plaintiff's retail stores in Grand Island, Nebraska; conversing with Plaintiff's customers; picketing the entrances and exists of Plaintiff's retail stores in Grand Island, Nebraska, by means of more than two pickets; distributing handbills by persons not carrying or exhibiting a picket sign; and picketing in violation of Sections 28-812, 28-814.01, and 28-814.02, R. S. Neb., Reissue of 1964.

IT IS FURTHER ORDERED that Plaintiff's application for a temporary injunction as requested in its Petition be set for hearing on June 8, 1969, at 9:30 a.m. in the Hall County District Court, Hall County Court House, Grand Island, Nebraska and that said Defendants appear and show cause why the temporary injunction as requested should not be issued.

BY THE COURT:

DONALD H. WEAVER,
District Judge

APPROVED AS TO FORM:

/s/ Thomas F. Dowd
THOMAS F. DOWD,
Attorney for Plaintiff

/s/ David D. Weinberg,
DAVID D. WEINBERG,
Attorney for Defendants

[*Caption Omitted in Printing*]

NOTICE OF MOTION

Please take notice that the attached motion for preliminary injunction will be brought on for hearing on September 12, 1969, before the Honorable Robert Van Pelt, or any other judge who may be sitting in his place and stead, at 10:30 a.m., United States Court House, Lincoln, Nebraska, at which time and place you may appear if you so desire.

/s/ Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

Dated at Washington, D. C.
this 5th day of September, 1969.

[*Caption Omitted in Printing*]

MOTION FOR PRELIMINARY INJUNCTION

Plaintiff moves this Court for a preliminary injunction enjoining the defendant Nash-Finch Company, d/b/a Jack & Jill Stores, its agents, servants, employees and attorneys and all persons in active concert and participation with it, from in any manner enforcing or seeking to enforce the following provisions of an injunction issued, upon application of the defendant, by the Honorable Donald Weaver of the District Court of Hall County, Nebraska, on June 25, 1969, against Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Union 271 ("Union"):

"1. No person other than bona-fide members of defendant union shall engage in picketing unless such person shall have first submitted himself or herself to the jurisdiction of this Court by filing a general appearance herein as a defendant in these proceedings;

2. Pickets are * * * enjoined from:

(c) Instigating conversation with plaintiffs [Nash-Finch's] customers in any matter [sic] relating to the dispute herein;

(d) Doing any act in violation of Section 28-812, 28-814.01, 28-814.02, R.S. Neb. 1964.

3. That no person, other than a picket or the named defendants, shall, on behalf of defendants, in any manner whatsoever picket or loiter about the premises of plaintiffs Grand Island stores . . ., nor display signs or distribute handbills or literature or cause to be published or broadcast any information pertaining to the dispute existing between the parties hereto."

The grounds in support of this motion, as more fully set forth in the complaint filed with this Court on August 29, 1969 (Civil Action No. 1583L) and in the memorandum submitted with this motion, are that:

(1) The portions of the State Court injunction complained of are invalid in that they violate Article VI, Clause 2, of the Constitution of the United States (the Supremacy Clause) since they seek to enjoin and regulate peaceful picketing or handbilling growing out of a labor dispute, conduct which falls within the exclusive jurisdiction of the National Labor Relations Act;

(2) Unless restrained by this court defendant will continue to enforce the provisions of said injunction objected to herein;

(3) Such action by defendant is contrary to the public interest as set forth by Congress in the National Labor Relations Act and will result in irreparable injury to the employees' rights under the National Labor Relations Act to engage in peaceful picketing.

WHEREFORE, for the reason set forth in the complaint, and in this motion, together with the attached memorandum, plaintiff moves this honorable Court for a preliminary injunction.

Dated at Washington, D. C.,
Sep. 5, 1969

/s/ Marcel Mallet-Prevost
MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

[*Caption Omitted in Printing*]

NOTICE OF MOTION

TO: MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

THOMAS F. DOWD
515 Executive Building
Omaha, Nebraska

Please take notice that the undersigned will bring the attached Motion to Intervene on for hearing before the United States District Court sitting in Lincoln, Nebraska on September 12, 1969, at 9:30 a.m., or as soon thereafter as counsel can be heard.

JACOBS AND GORE
201 N. Wells St.
Chicago, Illinois
372-1646

/s/ Solomon I. Hirsh
SOLOMON I. HIRSH
Counsel for Intervenor-Plaintiff

[*Caption Omitted in Printing*]

MOTION TO INTERVENE

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Union 271, by its attorneys, Jacobs and Gore, respectfully moves the Court for leave to intervene as a party plaintiff in the case under Rule 24(a)(2) or 24(b)(2), F.R. Civ. P. In support of its motion, the Union shows as follows:

1. This is a suit by the National Labor Relations Board to enjoin Nash-Finch Company from seeking to enforce, or enforcing, certain portions of a temporary injunction against the Union which the Company secured from the Hall County District Court. The Board is bringing the suit because the State Court injunction violates rights of the Union, its members and sympathizers which are protected by the National Labor Relations Act and which the States are therefore precluded from regulating or abridging.

2. The Union has substantial, direct and immediate interest in the outcome of this litigation. The granting or denial of relief will affect the Union's right to publicize its dispute with the Company in order to enlist public support in its campaign to induce the Company to obey the National Labor Relations Act and cease the unfair labor practices which a Board trial examiner found the Company has committed.

3. The Union is entitled to intervene as a matter of right, under Rule 24(a)(2), F.R. Civ. Pr. As the defendant in the State Court litigation, which is the subject matter of this suit, the Union "is so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect" its interest in having the State Court injunction vacated (quoting from Rule 24(a)(2)). See *Kozak* v. *Wells,* 278 F. 2d 104, 110 (8 Cir. 1960). A decision against the Board in this case could be used by the Company in the State Court litigation to rebut the Union's claim that the Company's suit is trenching on Federally protected rights.

Moreover, the Union's interest may not be adequately represented by the Board. The Board is charged with protecting the "public interest" expressed in the National Labor Relations Act, but there are "private interests" which are also at stake, and the two are at times separate and distinct. For that reason, the Supreme Court recently

held that intervention should be granted to the successful charging partly in unfair labor practice cases coming before the Courts of Appeals under Section 10(e) of the Act (29 U.S.C. Sec. 160(e)). *International Union, U.A.W.* v. *Scofield*, 382 U.S. 205, 217-221 (1965). The same reasoning applies here. Thus, for example, while challenging the breadth of the injunction the Company secured from the State Court, the Board has not seen fit to challenge the statutes upon which the Company's complaint and the injunction are predicated. It is in the Union's interest to secure a ruling on the validity of those statutes, for their continued existence and threatened application against the Union daily serves to inhibit the Union in the exercise of rights guaranteed to it by the National Labor Relations Act and the First and Fourteenth Amendments to the Constitution of the United States.

4. In the event the Court is of the opinion that the Union is not entitled to intervene as a matter of right under Rule 24(a)(2), we urge that the Union be permitted to intervene under Rule 24(b)(2). The Union's claim clearly presents questions of law and fact in common with the main action. In the preceding paragraphs of this motion, we have shown the substantial interest the Union has in the outcome of this litigation, and therefore request that the Union be permitted to participate in it. Intervention will not delay or prejudice the rights of the original parties to this action.

WHEREFORE, the Union prays that its motion to intervene as a party plaintiff be granted.

/s/ Solomon I. Hirsh
SOLOMON I. HIRSH
JACOBS AND GORE
201 North Wells Street
Chicago, Illinois 60606

and

DAVID D. WEINBERG
300 Keeline Building
Omaha, Nebraska 68102
Attorneys for Plaintiff-Intervenor

Of Counsel:
JACOBS AND GORE
201 North Wells Street
Chicago, Illinois 60606

[*Caption Omitted in Printing*]

COMPLAINT OF INTERVENOR-PLAINTIFF

1. Intervenor-Plaintiff, hereinafter referred to as the Union, is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act (29 U.S. C. Section 152 (5)).

2. Defendant, hereinafter referred to as the Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware and is engaged in the business of retail selling of grocery and related products at locations in Grand Island, Nebraska. The Company is engaged in commerce, or a business affecting commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act (29 U.S.C. 152 (6) and (7)).

3. The Court has jurisdiction under 28 U.S.C. Sec. 1337, the National Labor Relations Act (29 U.S. C. Sec. 151, *et seq.*), and the First and Fourteenth Amendments to the Constitution of the United States.

4. The Union adopts and incorporates in this complaint paragraphs V and VI of the Board's complaint.

5. On May 27, 1969, the Company filed a petition for injunctive relief in the District Court of Hall County, Nebraska, against the Union, its officers, and certain individual pickets alleging, *inter alia,* that the Union was picketing by means of more than two pickets at the same time within 50 feet of the entrances and exits to the Company's stores, and within 50 feet of each other. Said picketing was alleged to constitute "mass picketing" as defined and proscribed by Section 28-814.02, R.R.S. Neb. 1943, Reissue 1964.

6. The Company also alleged that the Union's signs and handbills advised the public that the Union was on strike protesting the Company's unfair labor practices, and that such statements constitute false and malicious statements proscribed by Section 28-440, R.R.S. Neb., Reissue 1964.

7. On May 28, the State Court, per Judge Donald H. Weaver, issued a temporary restraining order. Thereafter the Union filed a motion to vacate the temporary restraining order and to dismiss the petition for lack of jurisdiction and failure to state a claim warranting relief. On June 25, 1969, Judge Weaver denied the motions and issued a temporary injunction.

8. The temporary injunction, *inter alia,* prohibits anyone from picketing who is not a bona-fide member of the Union

unless said person first submits himself to the jurisdiction of the Court by filing a general appearance as a defendant in the case; limits the number of pickets to two at each store; prohibits pickets from "instigating conversation with plaintiff's customers in any matter relating to the dispute herein;" bars them from "doing any act in violation of Section 28-812, 28-814.01 and 28-814.02 R.S. Neb. 1964;" and prohibits anyone other than a picket or the named defendants from, on behalf of the defendants, picketing the Company's premises, or displaying signs or distributing handbills or literature "or caus[ing] to be published or broadcast any information pertaining to the dispute existing between the parties hereto."

9. Section 28-812 R.S. Neb. 1964 provides:

> 28-812. *Picketing, defined; unlawful.* It shall be unlawful for any person or persons, singly or by conspiring together, to interfere, or to attempt to interfere with any other person in the exercise of his or her lawful right to work, or right to enter upon or pursue any lawful employment he or she may desire, in any lawful occupation, self-employment, or business carried on in this state, by doing any of the following acts: (1) using profane, insulting, indecent, offensive, annoying, abusive or threatening language toward such person or any member of his or her immediate family, or in his, her or their presence or hearing, for the purpose of inducing or influencing or attempting to induce or influence, such person to quit his or her employment, or to refrain from seeking or freely entering into employment, or by persisting in talking to or communicating in any manner with such person or members of his or her immediate family against his, her or their will, for such purpose; (2) following or intercepting such person from or to his work, from or to his home or lodging, or about the city, against the will of such person, for such purposes; (3) photographing such person against his will; (4) menacing, threatening, coercing, intimidating, or frightening, in any manner, such person for such purpose; (5) committing an assault or assault and battery upon such person for such purpose; or (6) loitering about, picketing or patrolling the place of work or residence of such person, or any street, alley,

road, highway, or any other place, where such person may be, or in the vicinity thereof, for such purpose, against the will of such person.

10. Section 28-814.01 and .02 R.S. Neb. 1964 provides:

28-814.01. *Mass picketing; unlawful.* It shall be unlawful for any person, singly or in concert with others, to engage in or aid and abet any form of picketing activity that shall constitute mass picketing as defined in section 28-814.02.

28-814.02. *Mass picketing; definition display of sign required.* (1) Mass picketing means any form of picketing in which there are more than two pickets at any one time within fifty feet of any entrance to the premises being picketed or within fifty feet of any other picket or pickets, or in which pickets constitute an obstacle to the free ingress and egress to and from the premises being picketed or any other premises, or upon the public roads, streets, or highways, either by obstructing by their persons or by the placing of vehicles or other physical obstructions.

11. Section 28-812, quoted above, on its face prohibits peaceful picketing for lawful purposes without the consent of the person picketed; in this case, such prohibition conflicts with the National Labor Relations Act and is therefore void under Article VI, Clause 2 of the Constitution (the Supremacy Clause); such prohibition also imposes unreasonable restraints upon freedom of speech, press and assembly, in violation of the First and Fourteenth Amendments to the Constitution.

12. Insofar as Subsection (1) of Section 28-814.02 defines "mass picketing" as "any form of picketing in which there are more than two pickets at any one time within either fifty feet of any entrance to the premises being picketed or within fifty feet of any other picket or pickets," and bars such picketing regardless of the factual circumstances in any particular case, it is void under Article VI, Clause 2 of the Constitution since it conflicts with the National Labor Relations Act, and it imposes unreasonable restraints upon freedom of speech in violation of the First and Fourteenth Amendments to the Constitution.

13. Subsection (2) of Section 28-814.02, quoted above,

by purporting to regulate the content of picket signs and the size of type said signs are to use, is void in this case under Article VI, Clause 2 of the Constitution since it conflicts with the National Labor Relations Act, and it imposes unreasonable restraints upon freedom of speech in violation of the First and Fourteenth Amendments to the Constitution.

14. In seeking and obtaining the foregoing injunction, the Company has violated the rights of the Union, its members and supporters as prescribed and protected by Sections 7 and 13 of the National Labor Relations Act (28 U.S.C. Secs. 157 and 163), and as prescribed and protected by the First and Fourteenth Amendments to the Constitution.

WHEREFORE, the Union, Plaintiff-Intervenor herein, prays:

1. Defendant be restrained from, in any manner, proceeding under or enforcing those portions of the Nebraska State Court injunction which regulates or restrains conduct, the regulation of which has been preempted by the National Labor Relations Act;

2. Defendant be restrained from, in any manner, proceeding under or enforcing those portions of said State Court injunction which regulates or restrains conduct protected by the First and Fourteenth Amendments to the Constitution;

3. A declaratory judgment issue declaring that the portions of Section 28-812 and 28-814.02 set forth in paragraphs 11, 12, and 13 above, are unconstitutional, unenforceable and void;

4. Defendant be assessed the costs of this action;

5. Such other and further relief as the Court may deem just and necessary.

/s/ Solomon I. Hirsh

SOLOMON I. HIRSH
JACOBS AND GORE
201 N. Wells St.
Chicago, Illinois 60606
and
DAVID D. WEINBERG
300 Keeline Building
Omaha, Nebraska 68102
Attorneys for Plaintiff-Intervenor

Of Counsel:
JACOBS AND GORE
201 N. Wells St.
Chicago, Illinois 60606
372-1646

[*Caption Omitted in Printing*]

OBJECTIONS TO MOTION TO INTERVENE

COMES Now the Defendant, Nash-Finch Company d/b/a Jack & Jill Stores by and through its Attorney, Thomas F. Dowd, and objects to the Motion to Intervene filed by Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Union 271, herein called the Union, pursuant to Rule 24 (a)(2) or 24 (b)(2) of the Federal Rules of Civil Procedure for the following reasons:

1. That the Union is not so situated that the disposition of the main action will as a practical matter impair or impede its ability to protect its interest since it would not be bound by any judgment in this action and would be able to continue to defend its position in the State Court and, if unsuccessful, avail itself of judicial review. See *National Labor Relations Board* v. *Swift & Company,* 130 F. Supp 214 (D.C. Mo. 1955), mod. on other grounds 233 F.2d 226 (8th Cir. 1956).

2. That the Union, as evidenced by the allegations in the proposed Complaint of Intervenor-Plaintiff, seeks to enlarge the issues of the main action by attacking the constitutionality of certain Nebraska Statutes and thus has advanced a claim which presents no question of law or fact in common with the main action.

NASH-FINCH COMPANY, d/b/a
JACK & JILL STORES,
Defendant

By Thomas F. Dowd
Its Attorney
THOMAS F. DOWD for the firm of
NELSON, HARDING, RICHLING, LEONARD & TATE, 515 Executive Bldg. Omaha.

[*Caption Omitted in Printing*]

MOTION TO DISMISS

COMES Now the Defendant pursuant to Rule 12(b) of the Federal Rules of Civil Procedure and moves the Court to dismiss the Complaint filed herein for the reason that Title 28, United States Code, Section 2283, deprives the Court of jurisdiction to grant the prayer of Plaintiff's Complaint.

In support of Defendant's Motion to Dismiss, the Court's attention is directed to *National Labor Relations Board v. Swift & Company,* 233 F.2d 226 (8th Cir. 1956) which Defendant suggests to be controlling authority for granting said Motion.

By Thomas F. Dowd
Its Attorney
THOMAS F. DOWD for the firm of
NELSON, HARDING, RICHLING,
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515 Executive Building
Omaha, Nebraska, 68102

NASH-FINCH COMPANY, d/b/a
JACK & JILL STORES,
Defendant

[*Caption Omitted in Printing*]

MEMORANDUM and ORDER

VAN PELT, *Judge* Filed Sep. 26, 1969

This matter comes before the Court on the motion of the National Labor Relations Board for a preliminary injunction to prevent the Nash-Finch Company (doing business as Jack & Jill Stores) from enforcing a state court injunction issued by the District Court of Hall County, Nebraska. The state court injunction restrains certain actions of individuals engaged in picketing Jack & Jill Stores in Grand Island, Nebraska. The picketing in question occurred during an attempt by Amalgamated Meat Cutter and Butcher Workmen of North America, AFL-CIO, District Union 271 to organize the meat cutters employed by Jack & Jill.

Also before the Court is the motion of Amalgamated to intervene as a party plaintiff in this action. Finally, Nash-Finch has filed a motion to dismiss the complaint. By agreement of counsel, all three motions were argued at a hearing held before this Court on September 12. The court, at the conclusion of that hearing, took submission of the motions. The matters raised by the motions now stand ready for determination.

It is the opinion of the Court that the jurisdictional question raised by the defendant, Nash-Finch, is dispositive of the case. We turn now to an examination of the power of this Court to grant the relief that the N.L.R.B. requests.

This matter is properly before this court under 28 U.S.C.A. § 1337 giving jurisdiction of questions arising under an Act of Congress to the District Courts. The National Labor Relations Act is such an Act. *Capital Service v. N.L.R.B.*, 347 U.S. 501 (1954).

However, in the instant case, this court is asked to restrain the enforcement of a state court injunction. In such a situation, there is a rigid limitation on the power of this court to act. 28 U.S.C. § 2283 provides:

> "A Court of the United States may not grant an injunction to stay proceedings in a State Court except as authorized by an Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The history of Section 2283 indicates that it is to be strictly construed and a particular case must be within the excep-

tions that are set out by the statute in order for an injunction to issue. *Amalgamated Clothing Workers of America, et al. v. Richmond Brothers, Co.* 348 U.S. 511 (1955). Thus, in order for the relief herein requested to be granted, the N.L.R.B. must bring itself within one of the above noted exceptions to Section 2283 or, in the alternative, show that this section does not apply in the instant case.

The N.L.R.B. offers three arguments to the effect that this Court has the authority to issue the injunction that is asked for. First, the Board argues that under the rationale of *Leiter Minerals, Inc. v. U.S.*, 352 U.S. 220 (1957), when the United States is the party applying for an injunction restraining state court proceedings, Section 2283 does not apply. Thus, the Board as an agency of the United States Government would also be excluded from the prohibition of Section 2283.

Secondly, it is argued that Section 2283 does not apply here as the state court is wholly without jurisdiction over the subject matter in that it has invaded a field preempted by Congressional legislation. See, e.g., *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

Finally, it is the Board's contention that the picketing in question is involved with the organizational activities which have been continuing over a period of time. In connection with these activities, an unfair labor practice charge has been filed with the Board by the Union. 29 U.S.C.A. §§ 160 (j) and (l) authorize the Board to seek injunctive relief in specific circumstances concerning unfair labor charges. Thus, the Board argues, if this Court finds Section 2283 applicable to the instant case, the questioned activities are within the ambit of sections (j) and (l) and therefore within the "as authorized by an Act of Congress" or the "in aid of its jurisdiction" exceptions to Section 2283. *Capital Service v. N.L.R.B.*, 347 U.S. 501 (1954).

In examining the first contention of the Board, it is noted that the Court of Appeals for this Circuit has held that the Board did not stand in the position of the United States for the purposes of determining the applicability of Section 2283 in a suit for injunctive relief. *N.L.R.B. v. Swift & Company*, 233 F. 2d 226 (8th Cir. 1956). It is the position of the Board, however, that the United States Supreme Court's decision in *Leiter Minerals, Inc., supra,* has under-

mined the Court of Appeal's holding on this point. We believe that a careful examination of Leiter and other relevant cases in this area does not bear out this contention.

We begin with the proposition that the intention of Congress to bestow the privileges and immunities of the Government upon agencies created by the Government must be clearly demonstrated. *Reconstruction Finance Corporation v. J. G. Menihan Corp.*, 312 U.S. 81 (1941). The Court of Appeals in *Swift & Company, supra,* found that

> "The Board has not demonstrated that it was the intention of Congress to exempt actions brought by it from the limitations imposed by section 2283." *Id* at 232.

We are of the opinion that in the instant case the Board has not established that it was the intention of Congress to bring it within the immunity of the United States insofar as concerns section 2283. While the *Leiter* case does establish the inapplicability of section 2283 to the United States, we find no justification in extending this doctrine to the National Labor Relations Board as an agency of the Government. To be considered is Mr. Justice Frankfurter's statement in *Amalgamated Clothing Workers, supra,* at 514 where he considers the import of the 1948 amendment to the predecessor of section 2283 which represents the section as it appears today.

> "By that enactment, Congress made it clear beyond cavil that the prohibition is not to be whittled away by judicial improvision."

We also are of the opinion that the Supreme Court's decision in *Amalgamated,* while bearing more directly on the second contention of the Board, also supplies compelling support for the position that the Board is not to be excluded from the prohibition of section 2283. This will be noted in the discussion of the preemption issue raised by the Board.

The Board next argues that the area covered by the state court injunction is within the exclusive jurisdiction of the N.L.R.B. and thus section 2283 does not apply. We feel that this argument is met squarely by the Supreme Court's findings in *Amalgamated Clothing Workers, supra.*

> "In the face of this carefully considered enactment [§ 2283], we cannot accept the argument of the petitioner and the Board, as amicus curiae, that § 2283 does

not apply whenever the moving party in the District Court alleges that the state court is 'wholly without jurisdiction over the subject matter, having invaded a field preempted by Congress.' No such exception had been established by judicial decision under former § 265. In any event, Congress has left no justification for its recognition now. This is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defened exceptions.

"We are further admonished against taking the liberty of interpolation when Congress clearly left no room for it, by the inadmissibility of the assumption that ascertainment of pre-emption under the Taft-Hartly Act is self-determining or even easy. As we have noted in the *Weber* case, 'the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds.' 348 U.S. at 480. What is within exclusive federal authority may first have to be determined by this Court to be so." *Amalgamated Clothing Workers, supra,* at 515-16.

Thus, while we note, although not deciding, that the complained of picketing in the instant case may be within the exclusive jurisdiction of the N.L.R.B. by virtue of the *San Diego Building Trades Council* case, this without more does not remove the limitation on this Court's power to grant the injunctive relief requested.

This would also reenforce our determination that the Board should not be considered as having the Government's immunity to section 2283. If this Court may not exercise its equity power to ban state courts from federally preempted areas, then there is no logic to the argument that the Board as administrator of the preempted areas and being vested with exclusive jurisdiction therein, should enjoy the exclusion from the operation of section 2283 when it seeks to protect this jurisdiction. Section 2283 provides that the Board will be exempt when the Court is "authorized by an act of Congress" to issue injunctive relief. The National Labor Relations Act in 29 U.S.C.A. 160 §§ (j) and (l) provides a remedy to the Board to protect this jurisdiction.

Thus, it is our conclusion that unless the Board can bring itself within one of the exceptions to section 2283, this Court is powerless to act in the case before us.

Preliminary to a discussion of this Court's authority to grant relief requested under section 10 (j) or 10 (l) of the Act. it is necessary to set forth the chronology of events leading up to the instant case.

An unfair labor charge was filed by the Union with the Board on October 9, 1968 alleging unfair labor practices on the part of the company. A complaint was issued on January 7, 1969 and a hearing was held thereon on February 11 and 12, 1969. The Trial Examiner's Decision and Recommended Order was issued April 28, 1969.

The trial Examiner found that the Company was engaged in unfair labor practices in that it refused to bargain with the Union as the exclusive representative of the employees in the appropriate unit, suggested the substitution of non-Union representation for Union representation, by soliciting revocation of prior Union authorizations, and by advising employees not to attend Union meetings and by coercively interrogating employees not to attend Union meetings and by coercively interrogating employees concerning Union representation (Exhibit B, filing #1). No mention of picketing is found in the Trail Examiner's Decision or Recommended Order. After the issuance of the Decision, the Company took exception to the findings and the case is currently pending before the Board.[1]

Approximately one month after the issuance of the Trial Examiner's Decision, the Union commenced picketing the Jack & Jill Store in Grand Island, Nebraska.

On May 27, 1969, the Company petitioned the District Court of Hall County, Nebraska, for injunctive relief against the picketing. The court granted the requested relief on June 25, 1969 and issued a temporary injunction.

It will be noted that no charges concerning the picketing have been filed by the Company or the Union with the N.L.R.B. The Board has made no examination of the picketing either with regard to Union or Company activity. Section 10 (j) of the Act reads:

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[1] On September 21, 1969 an article appeared in the Lincoln Evening Journal indicating that the National Labor Relations Board had found for the Nash-Finch Company, thus rejecting the findings of the Trial Examiner.

> "The Board shall have the power, upon the issuance of a complaint as provided in sub-section (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States . . . for appropriate temporary relief or restraining order." 29 U.S.C.A. § 160 (j)

Thus is would appear that for this Court to entertain a request for relief in a 10 (j) proceeding, there must exist, as a prerequisite to the Board's application, a complaint which has as its basis the activities in question. *National Labor Relations Board v. Swift & Company,* 233 F. 2d 226 (8th Cir. 1956). As has been noted, the picketing in question here has not been the basis for the issuance of such a complaint. This being the case, it is the conclusion of this court that under the circumstances, section 10 (j) does not authorize us to avoid the prohibitions of section 2283. We note that we do not determine that section 10 (j) would allow this Court to exercise its jurisdiction should all proper prerequisites be met, leaving this question for future determination.

The question next arises as to whether section 10 (l) affords a proper basis upon which to issue the relief requested. In this regard, the Board relies upon *Capital Service Inc. v. N.L.R.B.*, 347 U.S. 501 (1954). In this case, the manufacturer filed an unfair labor practice charge against the union concerning picketing activities. He also filed suit in a California state court for injunctive relief. The Board issued an unfair labor practice complaint against the union on a limited basis and instituted a 10 (l) proceeding in the United States District Court for an injunction restraining certain activities occurring during the course of picketing. Approximately one month prior to this, the California state court had issued the requested relief. In the 10 (l) proceeding, the Board asked that injunctive relief issue against the state court injunction; the United States Supreme Court held that as the state court injunction and the properly requested injunctive relief from the District Court touched the same basic activity, the District Court had properly restrained the state court injunction within

the meaning of the "in aid of its jurisdiction" exception to section 2283.

Thus, if we were, in the instant case, faced with an application by the Board for an injunction to restrain activities upon which a complaint had been issued, and were also confronted with a state court injunction which would interfere with the exercise of this Court's jurisdiction over the subject matter, we would be bound under the *Capital Service* case and the policies of the N.L.R.A. to restrain the enforcement of the state court decree. This is not the case here, however. The picketing in question is not involved in the complaint issued by the Board on January 7, 1969. If and when this complaint reduces itself to final adjudication by the Board and the Board applies to this Court for appropriate relief in a 10 (l) proceeding, the activities of the Company and those of the Union picketing are sufficiently separate to allow this Court to draft a decree against the Company without involving the picketing activities. See *N.L.R.B. v. Swift & Co. supra.*

It is the conclusion of this Court that it does not have the power by virtue of the limitations imposed upon it by section 2283 to issue the requested relief.

It may be pointed out that such a holding leads to the rather anomalous result. It could be argued that, in view of our holding, an employer may successfully frustrate Board action by applying to a state court for injunctive relief rather than filing an unfair labor practice charge with the Board. This is particularly relevant here where picketing activities are involved and, as noted earlier in this opinion, Supreme Court decisions indicate that Congress may have preempted this area to a large extent. We are also mindful that when picketing activities are required to be vindicated through lengthy appellate procedures, much of the impact of such activities as an economic weapon against the Company is lost.

The United States Supreme Court in *Amalgamated Clothing Workers, supra,* at 520, poses a question which is yet to be answered and upon its determination, may provide a remedy for situations such as the Board and Union are faced with in the instant case. Mr. Justice Frankfurter notes that it has not yet been decided whether a company's application to a state court for an injunction covering

federally preempted employee rights under § 7 and § 8 (a) (1) of the Act, may, in itself, constitute an unfair labor practice. See Footnote 6, at 520. Thus, if this were so, the Union could file an unfair labor charge with the Board upon which a complaint could issue and, at that time, the Board could invoke the injunctive power of the Court under section 10 (j) or 10 (l).

Our decision today does not cut off the Union or the Board from their rights of appellate review in both state and federal courts. Rather, we conclude that, under the factual situation found here, Congress has precluded this court from acting, seeking instead to maintain the traditional dichotomy of the federal and the state courts. We assume, as it proper, that federally protected rights will be vindicated in state courts to the same extent that they would find vindication in the federal courts.

In view of the above,

It Is Ordered that the motion of the National Labor Relations Board for a preliminary injunction, being filing #2, should be and hereby is overruled and denied.

In view of our disposition of the case, we do not feel it necessary to determine on the merits the motion of the Union to intervene in this action. It will be noted that counsel for the Union appeared and was heard on matters touching all three motions at the September 12th hearing.

It Is Therefore Further Ordered that the motion of the Union to intervene, being filing #3, should be and hereby is overruled and denied.

Finally, as it is this Court's determination that we are without jurisdiction to grant the relief requested,

It Is Therefore Further Ordered that the motion of the defendant Nash Finch to dismiss, being filing #6, should be and hereby is sustained and the complaint is dismissed.

Dated: September 26, 1969.

By The Court

/S/

Robert Van Pelt
Judge, U. S. District Court

[*Caption Omitted in Printing*]

NOTICE OF APPEAL

Notice is hereby given that the National Labor Relations Board, plaintiff above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the order denying the motion of the National Labor Relations Board for a preliminary injunction and granting Defendant's motion to dismiss entered in this action on the 26th day of September, 1969.

Dated at Washington, D. C. this 9th day of October, 1969.

/s/ Marcel Mallet-Prevost (J. T.)
Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

[*Caption Omitted in Printing*]

NOTICE OF APPEAL

[filed Oct. 21, 1969, Richard P. Peck, Clerk]

Notice is hereby given that Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, District Union 271, proposed intervenor plaintiff herein, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the order denying the Union's motion to intervene entered in this action on September 26, 1969.

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Counsel for the Union

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,983

NATIONAL LABOR RELATIONS BOARD, *Appellant*,

vs.

NASH-FINCH COMPANY, d/b/a JACK AND JILL STORES, *Appellee*.

and

No. 19,993

NATIONAL LABOR RELATIONS BOARD,

vs.

NASH-FINCH COMPANY, D/B/A JACK AND JILL STORES, a Delaware Corporation Authorized to Do Business in the State of Nebraska, *Appellee*,

vs.

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, DISTRICT UNION 271, *Appellant*.

Appeals from the United States District Court for the District of Nebraska.

[December 2, 1970.]

Before GIBSON and LAY, Circuit Judges and HUNTER, District Judge.

HUNTER, District Judge.

This case is before us on appeal from an order of the United States District Court for the District of Nebraska dismissing an action for injunctive relief instituted by the National Labor Relations Board against Nash-Finch Com-

pany, d/b/a Jack & Jill Stores. The Board's complaint, brought pursuant to 28 U.S.C. Section 1337,[1] sought to restrain the Company from proceeding under or from enforcing an injunction issued by the District Court of Hall County, Nebraska, against Amalgamated Meat Cutter and Butcher Workmen of North America, AFL-CIO, District Union 271 and persons in active concert and participation with it, on the grounds that such injunction regulated conduct preempted by the National Labor Relations Act and interfered with the Board's exclusive jurisdiction over the subject. The Union by motion unsuccessfully endeavored to intervene as a party plaintiff in the action, and also has appealed.

The District Court in a carefully considered unpublished opinion ruled against both the Board and the Union. Upon consideration of the various issues presented on appeal, we affirm.

Background

In August, 1968, the Union began an organizing campaign among the meat department employees of the Jack & Jill stores in Grand Island, Nebraska. The Union demanded recognition based on signed authorization cards, and the Company expressed what it termed a good faith doubt of the Union's majority status, refused to bargain and filed a petition with the National Labor Relations Board for an election.

On October 9, 1968, the Union filed unfair labor practices against the Company alleging violations of Section 8(a) (1) and (5) of the Labor Management Relations Act. The Board's Regional Director investigated the charges regarding certain Company conduct at its Grand Island and Hastings, Nebraska stores and on January 7, 1969, issued an unfair labor practice complaint concerning the Company's refusal to bargain with the Union and miscellaneous unfair labor practices involving interrogation and solicitation by the Company of its employees regarding the Union. The Company denied the alleged unfair labor practices.

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[1] 28 U.S.C. § 1337 gives a District Court jurisdiction of questions arising under an Act of Congress; see, *Capital Service* v. *N.L.R.B.*, 347 U.S. 501 (1954); *Amalgamated Clothing Workers of America* v. *Richman Brothers*, 348 U.S. 511.

Following the statutory hearing, the trial examiner on April 28, 1969, found that the Company had violated Section 8(a) (1) and (5) of the Act by refusing to bargain with the Union as the exclusive representative of its employees in an appropriate unit, by suggesting the substitution of non-Union in place of Union representation, by soliciting employee revocation of prior Union authorizations as bargaining agent, by advising employees not to attend Union meetings and by coercively interrogating employees concerning Union representation. The trial examiner recommended inter alia, that the Company cease and desist from soliciting employee revocation of Union designation cards, suggesting the substitution of non-Union representation, advising employees not to attend Union meetings, coercively interrogating employees concerning Union representation and in any like or related manner interfering with, restraining or coercing employees in the exercise of their rights under the Act. The trial examiner also recommended that the complaint be dismissed as to allegations of unfair labor practices not specifically found to have been engaged in. The Company filed exceptions to the recommended decision.

Approximately one month after the issuance of the trial examiner's recommended decision, and before the Board's decision, the Union began picketing the Company's Grand Island, Nebraska stores with signs advising the public that the Union was striking in protest of the Company's unfair labor practices. The Union also distributed handbills stating the Company refused to bargain or comply with other findings or recommendations of a trial examiner of the National Labor Relations Board and urged the public not to shop at the Company's stores.

On September 17, 1969, the Board reversed the trial examiner's decision and concluded that the Company had not violated Sections 8(a) (1) and (5) of the Act by refusing to bargain with the Union, and that the Union had not represented a valid majority of the Company's employees when the bargaining demand was made. The Board concluded the Company had violated Section 8(a) (1) by its other actions and it entered a cease and desist order in that regard.

On May 27, 1969, the Company filed a petition for injunctive relief in the District Court of Hall County, Nebraska

against the Union, its officers and certain individual pickets, alleging that the Union's picketing as engaged in included threatening and intimidating customers, stopped, blocked, and prevented free ingress and egress of the public to and from the picketed premises and constituted mass picketing, in violation of Section 28—814.02 of the Nebraska Revised Statutes. Shortly thereafter the state court issued its injunction which limited the Union's picketing in certain respects.[2]

On August 27, 1969, the Board filed a complaint in the Federal District Court of Nebraska against the Company, seeking to restrain the Company from enforcing or attempting to enforce those parts of the state court temporary injunction alleged to violate Article VI, Clause 2 (The Supremacy Clause) of the Constitution of the United States because it conflicted with the National Labor Relations Act, and other parts of the injunction claimed to restrain peaceful picketing[3] and to be within the area arguably preempted by the National Labor Relations Act.

Upon motion by the Company, the federal district court dismissed the complaint, relying on 28 U.S.C. Section 2283 which provides, "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." It also dismissed the Union's motion to intervene as a party plaintiff.

First Contention

On this appeal the Board contends that the National Labor Relations Board is the United States for the purpose

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[2] The Union was limited, inter alia, to two pickets at each store; enjoined from distributing certain handbills, from blocking entrances or exits to the store, from conversing with the store's customers and from picketing in violation of the mentioned Nebraska statutes.

[3] No record testimony was taken in the district court regarding the factual situations surrounding the picketing. Appellant denies that only peaceful picketing occurred, stating in its brief that there were blocked entrances, nails in parking lots, property damage and a series of bomb threats. Because of our finding that the federal district court was without authority to enjoin the state court proceeding, we do not reach the question of whether the state court had power or jurisdiction to issue the order restraining the primary picketing. See, *Atlantic Coast Line R. Co.* v. *Engineers*, . . . U.S. . . . (1970).

of 18 U.S.C. Section 2283, and therefore that provision is not a bar to the issuance of a federal district court injunction. It cites and relies on *Leiter Minerals* v. *United States,* 352 U.S. 220 (1957).

We recognize that in a long line of decisions it has been decided that the prohibition of Section 2283 does not apply to the United States as a party seeking an injunction of state court proceedings. *Leiter Minerals* v. *United States, supra; Machesky* v. *Bizzell,* 414 F.2d 283 (5th Cir. 1969); *United States* v. *Wood,* 295 F.2d 772 (5th Cir. 1961); *Studebaker Corp.* v. *Gittlin,* 360 F.2d 692 (2nd Cir. 1966); *Baines* v. *City of Damville,* 337 F.2d 579 (4th Cir. 1964), *cert. den.* 381 U.S. 939; *Brown* v. *Wright,* 137 F.2d 484 (4th Cir. 1943); *U.S.* v. *Farmers State Bank,* 249 F. Supp. 579 (D. S.D. 1966); *Sobel* v. *Perez,* 289 F.Supp. 392 (E.D. La. 1968). However, the Board's contention and rationale that it is to be treated as the United States since it is an agency of the United States, and therefore that Section 2283 does not bar the issuance of an injunction has been unsuccessfully asserted by it over the years, and has been firmly rejected by this court in *N.L.R.B.* v. *Swift & Co.,* 233 F.2d 226 (8th Cir. 1956). We quote from that decision, loc. cit. 232:

"The Board, citing United States v. United Mine Workers of America, 330 U.S. 258, 272, 67 S. Ct. 677, 91 L. Ed. 884, asserts that statutes which in general terms divest previously-existing rights will not be applied to the sovereign without express words to that effect, and then contends that as an agency of the United States it must be considered in the same light as the United States for the purpose of the construction of the applicability of section 2283. The authorities cited by the Board do not support its contention that it has acquired all the privileges and immunities of the United States. For example, we think Nathanson v. National Labor Relations Board, 344 U.S. 25, 73 S.Ct. 80, 97 L.Ed. 23, cited by the Board, negatives the Board's contention. It was there held that a debt owed the Board was not entitled to preference as a debt owed the United States. The intention of Congress to bestow the privileges and immunities of the Government upon agencies created by the Government must be clearly demonstrated. Reconstruction Finance Corporation v. J. G. Menihan Corp., 311 U.S. 81, 61 S.Ct. 485, 85 L.Ed. 595."

* * *

"The Board has not demonstrated that it was the intention of Congress to exempt actions brought by it from the limitations imposed by section 2283."

Thus, in *Swift* and in other decisions it is established that the intention of Congress to bestow the privileges and immunities of the United States upon agencies created by the United States must be clearly demonstrated. As in *Swift,* there is no demonstration here that Congress intended to exempt actions brought by the National Labor Relations Board from the limitation imposed by Section 2283, and we are not justified in extending the exemption doctrine applicable to the United States to that Board. As stated by the Supreme Court in *Amalgamated Clothing Workers, supra,* 514: "By that enactment [Section 2283], Congress made it clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation."[4] Many of the problems of state-federal relationship which Congress sought to avoid by enacting Section 2283 would not be avoided if by judicial improvisation we extended the doctrine of the *Leiter* case to include federal agencies not specifically granted the cloak of sovereignty by statute. The *Leiter* case, supra, involved the United States itself and not an agency of the United States.

We again hold that for the purpose of Section 2283 applicability, the National Labor Relations Board is an administrative agency of the United States, and is not the United States. We further hold that Section 2283 is applicable to the National Labor Relations Board as a party seeking to enjoin a state court injunction or state court proceedings.

Second Contention

The Board next contends that the area covered by the state court injunction has been preempted by Congress, and is within the exclusive jurisdiction of the National Labor Relations Board. Therefore, the Board asserts, Section 2283 does not apply as the state court is wholly without jurisdiction over the subject matter.

This contention of a general federal preemption of picketing so as to preclude applicability of Section 2283 previously

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[4] To the same effect, see, *Norwood* v. *Parenteau,* 228 F.2d 148 (8th Cir. 1955), cert. den. 351 U.S. 955 (1954).

has been unsuccessfully urged by the Board, and others, in other cases. In *Swift, supra,* loc. cit. 230, this court ruled the contention against the Board, citing and quoting from *Amalgamated Clothing Workers of America* v. *Richman Brothers,* 348 U.S. 511, 515-516. There, speaking for the Supreme Court Mr. Justice Frankfurter stated: "In the face of this carefully considered enactment, [Section 2283] we cannot accept the argument of petitioner and the Board, as amicus curiae, that § 2283 does not apply whenever the moving party in the District Court alleges that the state court is 'wholly without jurisdiction over the subject matter, having invaded a field preempted by Congress.' No such exception had been established by judicial decision under former § 265. In any event, Congress has no justification for its recognition now. This is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions."

We further declared in *Swift,* loc. cit. 516, that: "The [Supreme] Court, 348 U.S. at page 518, 75 S. Ct. at page 457 also fully answers the contention made in our present case, that if a State action is not halted the Federal labor relations plan will be disrupted, by stating that the State courts have for many years adequately protected Federal rights, and that. 'The prohibition of § 2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts.' "[5]

Even more directly to the point, is the recent case of *Atlantic Coast Line R. Co.* v. *Engineers,* . . . U.S. . . . (1970), in which a federal district court enjoined a railroad from invoking an injunction issued by a Florida state court prohibiting certain picketing by the Union.[6] Speaking

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[5] The anti-injunction statute has been on the books in some form since 1793. See, Act of March 2, 1793, Ch. 22, #5, 1 Stat. 335., Durfee & Sloss, Federal Injunction against Proceedings in State Courts: The Life History of a Statute, 30 Mich. L. Rev. 1145 (1932).

[6] *Atlantic Coast Line R. Co.* v. *Brotherhood of Engineers,* . . . U.S. . . . (1970), held that the prohibition in 28 U.S.C. § 2283 can not be evaded by addressing an order to the parties or by prohibiting utilization of the results of a completed state court proceeding. See, also, *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.,* 309 U.S. 4 (1960); *Hill* v. *Martin,* 296 U.S. 393 (1935).

through Mr. Justice Black, the Supreme Court reversed and declared: "First, a federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear. This rule applies regardless of whether the federal court itself has jurisdiction over the controversy, or whether it is ousted from jurisdiction for the same reason that the state court is. Cf. *Amalgamated Clothing Workers* v. *Richman Bros.*, supra, at 519-520, 99 L. Ed. at 609-610, 75 S.Ct. 452. This conclusion is required because Congress itself set forth the only exceptions to the statute, and those exceptions do not include this situation. Second, if the District Court does have jurisdiction, it is not enough that the requested injunction is related to that jurisdiction, but it must be *'necessary in aid of'* that jurisdiction. While this language is admittedly broad, we conclude that it implies something similar to the concept of injunctions to "protect or effectuate" judgments. Both exceptions to the general prohibition of § 2283 imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case."

* * *

"Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion."

We conclude there has not been any general preemption of the field so as to deprive the state court of jurisdiction over the subject matter and to cause Section 2283 to be inapplicable in a federal court proceeding to enjoin enforcement of a state court injunction.

Third Contention

The Board further contends that if Section 2283 is applicable, the questioned activities are within the ambit of

Sections 10(j) and 10(l) of the National Labor Relations Act and therefore within the "as authorized by an Act of Congress" or "in aid of its jurisdiction" exceptions to Section 2283. However, the Board has not issued a complaint in the instant case which will allow it to seek an injunction under the terms of 10(j) or 10(l) of the National Labor Relations Act.[7] The picketing in this case which has been enjoined by the state court has never been made the subject of an unfair labor practice charge or complaint.[8] The state court injunction does not concern itself with a refusal to bargain, interrogation of employees or solicitation of employees to withdraw from the Union or with any other matter before the Board in its unfair labor practice complaint of January 7, 1968.

Thus, the Board is not in a sound position on the record before us to successfully contend the requested federal injunction falls within the statutory exceptions "as authorized by an Act of Congress" or the "in aid of its jurisdiction," and in the light of the teachings in *Atlantic Coast Line R. Co. and Amalgamated Clothing Workers of America, supra,* we find no merit in the Board's contention in that regard.

The Board cites *Capital Service Inc.* v. *N.L.R.B.,* 347 U.S. 501 (1954). There, the Company had filed suit in the state court for an injunction against the Union and had also filed with the Board a charge of unfair labor practice against the Union. Each had as a basis the same conduct of the Union. The state court enjoined all picketing of retail stores. The Regional Director issued an unfair labor practice complaint of a limited nature and petitioned the federal district court for an injunction restraining such conduct of the Union pending final adjudication by the Board, as required by Section 10(l) of the Act. Simultaneously with the filing of the Section 10(l) petition, the Board filed suit in the same court asking that petitioner be enjoined from enforcing the state court injunction. The district court granted a preliminary injunction restraining the employer from enforcing the state court injunction. The Supreme Court affirmed, holding that the injunction issued by the District

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[7] 29 U.S.C. § 160 (j) and (l).

[8] The federal trial court found "the picketing in question is not involved in the complaint issued by the Board on January 7, 1969."

court was "necessary in aid of its jurisdiction" and thus permitted under the exceptions specifically allowed by Congress. However, *Capital Service, Inc.*, is clearly inapplicable here, for as earlier noted, there has not been any application by the Board for an injunction to restrain activities upon which a complaint has been issued by it. Nor are we confronted in the instant case with the same basic activity as that which the state court had before it, for 10(j) and (l) has not been followed so as to present any picketing issue to the federal court.

Thus, we have concluded the federal district court correctly decided that in view of the limitations placed on it by 28 U.S.C. Section 2283 it did not have power to issue the relief requested by the Board.

Motion to Intervene

We also accord with the district court's denial of the motion of the Union to intervene entered after the trial court had determined it did not have power to grant the relief requested by the Board and dismissed the Board's complaint. Since the plaintiff—the Board—had not brought its action within any of the exceptions to Section 2283, no proper purpose would be served by permitting the requested intervention. *Collins* v. *Laclede Gas Co.*, 237 F.2d 633, (8 Cir. 1956); *Rosso* v. *Commonwealth of Puerto Rico*, 226 F.Supp. 688 (D. P.R. 1964).

In accordance with the reasons given above, the judgment of the district court is affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[filed Jan. 6, 1971, Richard P. Peck, Clerk]

Nos. 19983-19993.
September Term, 1970

No. 19983

National Labor Relations Board, Appellant, v. Nash-Finch Company, d/b/a Jack & Jill Stores, a Delaware Corporation authorized to do business in the State of Nebraska, Appellee.

No. 19993.

National Labor Relations Board, vs. Nash-Finch Company, d/b/a Jack & Jill Stores, a Delaware Corporation authorized to do business in the State of Nebraska, Appellee.

Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, District Union 271, Appellant.

APPEAL FROM the United States District Court for the ..... District of Nebraska.

THIS CAUSE came on to be heard on the record from the United States District Court for the ..... District of Nebraska and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

December 2, 1970

Costs taxed in favor of the appellee:

Printing 25 copies of brief of appellee in Nos. 19983 and 19993	$130.19
Total costs of appellee for recovery from appellants in the U.S. District Court.	$130.19,

A true copy.
Attest:

/s/ Illegible
Clerk,
U.S. Court of Appeals,
Eighth Circuit.
December 31, 1970.

SUPREME COURT OF THE UNITED STATES

No. 1420, October Term, 1970

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

NASH-FINCH COMPANY, dba JACK AND JILL STORES

ORDER ALLOWING CERTIORARI. Filed April 26, 1971.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

* U.S. Government Printing Office: 1971—425-594/660